(1)

Supreme Court, U.S.
FILED

No. 05-1466 MAY 16 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

STEPHEN J. BUTLER
THOMPSON HINE
312 Walnut Street
14th Floor
Cincinnati, Ohio 45202
(513) 352-6700

DEBRA J. PEARLSTEIN
ELIZABETH M. AVERY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GREGORY S. COLEMAN
Counsel of Record
LISA R. ESKOW
MELANIE P. SARWAL
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 1350
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioner

QUESTION PRESENTED

May a state court that is applying the Federal Arbitration Act adopt a distinct test for the arbitrability of statutory and tort claims that considers only whether the elements of those claims reference the parties' contract and ignores whether they "touch matters" within the scope of the parties' arbitration agreement?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Kentucky Court of Appeals were plaintiffs-appellees Northern Kentucky Medical Society, Academy of Medicine of Cincinnati, E. Douglas Baldridge, M.D., P. Scott Becker, M.D., A. Lee Greiner, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, M.D., and Raymond Will, M.D., and defendants-appellants United HealthCare of Ohio, Inc., Anthem Health Plans of Kentucky, Inc. d/b/a Anthem Blue Cross and Blue Shield, and Aetna Health, Inc. Anthem and Aetna were dismissed from the case by the Kentucky Supreme Court.

This petition is filed on behalf of United HealthCare of Ohio, Inc. No publicly held companies own 10% or more of United HealthCare of Ohio, Inc. United HealthCare of Ohio, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Inc., a publicly held company.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings Below and Corporate Disclosure Statement ii

Table of Authorities iv

Opinions and Orders Below 3

Jurisdiction 4

Statutory Provisions Involved 4

Statement of the Case 6

Reasons for Granting the Writ 9

I. Kentucky's Arbitrability Standard Conflicts with Established Arbitrability Principles Articulated by This Court and the Federal Courts of Appeals 10

A. The National Policy Favoring Arbitration Applies Equally to State Courts 10

B. Kentucky's Arbitrability Standard for Non-Breach-of-Contract Claims Contravenes Fundamental Principles for Analyzing the Scope of FAA-Governed Arbitration Agreements 11

C. The Kentucky Standard Conflicts with the Second Circuit's Use of the Touch-Matters Test for Price-Fixing Conspiracy Claims 14

D. The Kentucky Decision Contravenes the Court's Directive to Construe Arbitration Agreements in Favor of Arbitration 16

II. Kentucky's Hostility to Arbitration Invites Gamesmanship and Forum Shopping 17

Conclusion 20

TABLE OF AUTHORITIES

Cases

Acad. of Med. of Cincinnati v. *Aetna Health, Inc.*, 842 N.E.2d 488 (Ohio 2006) 2, 8-9, 17
Acad. of Med. of Cincinnati v. *Aetna Health, Inc.*, 800 N.E.2d 1185 (Ohio App. 2003), aff'd, 842 N.E.2d 488 (Ohio 2006) 8
Aiken v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873 (S.C. App. 2005) 11, 17, 18
Am. Safety Equip. Corp. v. *J.P. Maguire & Co.*, 391 F.2d 821 (CA2 1968) 12
Anthem Health Plans of Ky., Inc. v. *Acad. of Med. of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, 2004 Ky. App. LEXIS 315 (Ky. App. Oct. 29, 2004), review denied *sub nom. Anthem Health Plans of Ky., Inc.* v. *Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006) 3-4
Brown v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217 (CA11 2000) 14
Cox Broad. Corp. v. *Cohen*, 420 U.S. 469 (1975) 4
Crown Homes, Inc. v. *Landes*, 27 Cal.Rptr.2d 827 (Cal. App. 1994) 13
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 16
Fazio v. *Lehman Bros.*, 340 F.3d 386 (CA6 2003) 13, 18
Fyrnetics (H.K.) Ltd. v. *Quantum Group, Inc.*, 293 F.3d 1023 (CA7 2002) 13-14, 18
Genesco, Inc. v. *T. Kalcuchi & Co., Ltd.*, 815 F.2d 840 (CA2 1987) 13, 14

TABLE OF AUTHORITIES

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 3, 10, 12
Gregory v. *Electro-Mech. Corp.*,
83 F.3d 382 (CA11 1996) 14
Hunt v. *Up N. Plastics, Inc.*,
980 F.Supp. 1046 (Minn. 1997) 13
In re Currency Conversion Fee Antitrust Litig.,
265 F.Supp.2d 385 (SDNY 2003) 15
JLM Indus., Inc. v. *Stolt-Nielsen S.A.*,
387 F.3d 163 (CA2 2004) 3, 14, 15
Kotam Elecs., Inc. v. *JBL Consumer Prods., Inc.*,
93 F.3d 724 (CA11 1996) (en banc) 12
Loy v. *Harter*,
128 S.W.3d 397 (Tex. App. 2004) 11, 17, 18
Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) ..... *passim*
Moses H. Cone Mem'l Hosp. v.
Mercury Constr. Corp.,
460 U.S. 1 (1983) 12, 16
MS Credit Ctr. v. *Horton*, __ So.2d __, No.
2004-CA-01699-SCT, 2006 WL 408415
(Miss. Feb. 23, 2006) 13
N.Y. Cross Harbor R.R. Terminal Corp. v.
Consol. Rail Corp.,
72 F.Supp.2d 70 (EDNY 1998) 13
Nghiem v. *NEC Elecs., Inc.*,
25 F.3d 1437 (CA9 1994) 12
PacifiCare Health Sys., Inc. v. *Book*,
538 U.S. 401 (2003) 3, 12
Pennzoil Exploration & Prod. Co. v.
Ramco Energy Ltd.,
139 F.3d 1061 (CA5 1998) 14

TABLE OF AUTHORITIES

Seacoast Motors of Salisbury, Inc. v. *DaimlerChrysler Motors Corp.*, 271 F.3d 6 (CA1 2001) 12
Shearson/Am. Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 3, 12, 17
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 10, 19
United Steelworkers of Am. v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 16

Statutes & Rules

9 U.S.C. §2 4
9 U.S.C. §3 7
9 U.S.C. §4 ..... 4-5, 7
28 U.S.C. §1257(a) 4
KY. REV. STAT. §367.175 6
KY. REV. STAT. §417.060 7
SUP. CT. R. 10(b) 9
SUP. CT. R. 10(c) 9

IN THE

Supreme Court of the United States

No. ___

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to halt a growing trend in which state courts are determining the arbitrability of statutory and tort causes of action using a test that egregiously undermines the Federal Arbitration Act's policy favoring arbitration and the Court's arbitration precedent. By focusing restrictively on whether the elements of a claim reference the parties' contract, and not on whether the claims "touch matters" within the scope of the parties' arbitration agreement, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985), the Kentucky Court of Appeals disregarded the parties' expressed intent to arbitrate all disputes related to the parties' business relationship. The court adopted a recent holding in parallel litigation in Ohio against the same managed care defendants

concerning the same broad arbitration agreement, concluding that state antitrust claims could not be arbitrated because the elements of the claims did not reference the contract at issue—even though the contract embodied the precise price-fixing conspiracy alleged as the antitrust violation. Under this contract-reference rule of arbitrability, parties in Kentucky and Ohio may evade their arbitration obligations through artful pleading and semantics, even when the substance of a claim unquestionably touches matters within the scope of the parties' agreement to arbitrate. The Court should determine whether the FAA and the Court's established arbitrability principles permit that result.

Kentucky's dangerous distortion of arbitration law is compounded by the Ohio Supreme Court's approval of the identical contract-reference test in *Academy of Medicine of Cincinnati* v. *Aetna Health, Inc.*, 842 N.E.2d 488 (Ohio 2006). Because these two cases present the same arbitrability question and, together, demonstrate a growing state-court trend, United is simultaneously filing a petition for writ of certiorari in the Ohio case that reiterates the arguments in this petition.[1]

The Kentucky and Ohio decisions assail the fundamental premise of the federal arbitration system, which requires courts to respect and enforce contracting parties' agreements not to litigate particular categories of disputes by designating them for arbitration. In adopting a constrictive test for the arbitrability of statutory and tort causes of action, the Kentucky and Ohio courts ignored the Court's consistent directives that, under the FAA, arbitration agreements must be implemented according to their negotiated terms, that they must be interpreted with a presumption in favor of arbitrability, and that broad arbitration agreements must be faithfully enforced to effectuate their liberal scope, rendering

---

[1] See Petition for Writ of Certiorari, *United HealthCare of Ohio, Inc.* v. *Acad. of Med. of Cincinnati* (No. 05-____).

arbitrable all disputes involving allegations that touch matters covered by the arbitration agreement. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625-626 & n.13.

Moreover, the Kentucky and Ohio decisions directly conflict with the Court's explicit recognition of the arbitrability of statutory causes of action in *Mitsubishi*, 473 U.S., at 614 (international antitrust claims), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242-243 (1987) (RICO and §10(b) Securities Exchange Act claims), *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act claims), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (RICO claims). The Kentucky and Ohio decisions also specifically conflict with the Second Circuit's analysis of the arbitrability of price-fixing conspiracy claims, in particular, in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004).

Under Kentucky and Ohio's unsupportable arbitrability approach—which implements a standard previously applied by Texas and South Carolina courts as well—these courts now treat arbitration agreements differently than other state and federal courts whenever litigants bring statutory and tort claims without explicitly referencing the parties' underlying contract. This rule not only puts Kentucky and Ohio at odds with other jurisdictions, but also invites gamesmanship and forum shopping. The Court should grant the petition to protect arbitral rights and halt the end run around arbitration reflected by this growing state-court trend.

OPINIONS AND ORDERS BELOW

The Boone County Circuit Court denied defendants' motions to compel arbitration and to dismiss or stay the proceedings in an unpublished opinion. See App. 1a. The Kentucky Court of Appeals's decision is available at *Anthem Health Plans of Kentucky, Inc.* v. *Academy of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-

MR, 2003-CA-000754-MR, 2004 Ky. App. LEXIS 315 (Ky. App. Oct. 29, 2004), review denied *sub nom. Anthem Health Plans of Ky., Inc.* v. *Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006). See App. 4a. That court subsequently denied a petition for rehearing in an unpublished order. See App. 12a. The Kentucky Supreme Court denied discretionary review in an unpublished order directing that the court of appeals's opinion not be published. See App. 13a..

JURISDICTION

The Kentucky Supreme Court denied discretionary review on February 15, 2006. App. 13a. The Court has jurisdiction under 28 U.S.C. §1257(a). See *Cox Broad. Corp.* v. *Cohen*, 420 U.S. 469, 482-483 (1975).

STATUTORY PROVISIONS INVOLVED

The enforcement provision of the Federal Arbitration Act provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The FAA permits parties to petition a court for an order compelling arbitration when another party does not arbitrate as required by an arbitration agreement:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the

controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. §4.

The relevant state antitrust statutory provision from Kentucky appears in the appendix.

STATEMENT OF THE CASE

United HealthCare of Ohio, Inc., enters into provider agreements with physicians and physician groups under which the providers agree to accept rates established in the contract when they treat individuals covered by health benefit plans insured or administered by United. These contracts establish and govern the parties' relationships, including the categories of medical services, claim-reimbursement procedures, and fee schedules. The provider agreements require United to reimburse contracting physicians who provide covered services to members of United health plans and set out the reimbursement rates for particular types of services.

Each of the respondents in this case is a party to a provider agreement with United. In addition to setting fee schedules that establish the reimbursement rates to be paid for medical services provided to patients covered by United's health plans, each contract also addresses the possibility of disagreements in the course of the parties' relationship by including an expansively worded arbitration clause that mandates arbitration of "any disputes about their business relationship."[2] See App. 6a.

Six physicians and two medical associations practicing in the Northern Kentucky/Greater Cincinnati area filed this state antitrust suit against United and two other health care companies.[3] The single-count, class-action complaint asserts an antitrust claim under the Kentucky Consumer Protection Act, KY. REV. STAT. §367.175, alleging that the reimbursement rates set by the contracts containing the parties' arbitration clauses are unreasonably low as a result of a

---

[2] United's provider contract with respondent Dr. A. Lee Greiner requires arbitration of disputes that "arise out of or relate to" the contract. See App. 2a.

[3] In the trial court, the defendants included Anthem Blue Cross and Blue Shield and Aetna Health, Inc.

conspiracy among the defendant managed care companies to fix prices in violation of state law. See Pls.' Compl. 2-3, 5-6, 11.

As remedies for the alleged wrongdoing, respondents seek an injunction ordering United to cease and desist from the alleged unlawful conspiracy to artificially depress physician reimbursement rates reflected in the provider agreements and to modify the parties' contracts by setting reimbursement rates at reasonable levels in relation to comparable regional markets. *Id.*, at 12. Respondents also seek damages for the compensation they contend should have been paid beyond the amount of the contractual reimbursement rates they received for providing services. *Ibid.*

Because the allegations center on the parties' business relationship, United and its codefendants invoked §4 of the Federal Arbitration Act, 9 U.S.C. §4, and §417.060 of the Kentucky Arbitration Act, KY. REV. STAT. §417.060, to compel arbitration of the claims under the parties' arbitration agreements. United and the other defendants also moved to dismiss or, alternatively, to stay the proceedings pending arbitration pursuant to §3 of the FAA, 9 U.S.C. §3, as well as §417.060 of the Kentucky Arbitration Act, KY. REV. STAT. §417.060.

Limiting the scope of arbitration to contractual claims, the trial court ruled that the price-fixing conspiracy claim was not arbitrable. App. 2a. That court concluded that respondents' antitrust claim did not "arise out of or relate to the contracts" between the parties and that "the parties never agreed to arbitrate claims that were independent of any breach of contract." *Ibid.*

In parallel litigation in Ohio, another group of physicians sued United and other managed care companies, alleging violations of Ohio antitrust law based on the same rate-fixing theory as in Kentucky. In that case, the Ohio Court of Appeals applied the same contract-reference standard used by

the Kentucky trial court and held that the Ohio antitrust claims were not arbitrable. See *Acad. of Med. of Cincinnati* v. *Aetna Health, Inc.*, 800 N.E.2d 1185 (Ohio App. 2003), aff'd, 842 N.E.2d 488 (Ohio 2006).

Subsequently, on appeal of the Kentucky trial court's decision, the Kentucky Court of Appeals adopted, verbatim, the reasoning of the Ohio appellate court and refused to compel arbitration or stay the proceedings. App. 10a. Citing a supposed "reluctance by the federal and state courts to compel arbitration of antitrust claims," and expressing its belief that the "there is soundness in the reasoning that public policy considerations favor judicial resolution," App. 7a, 8a, the court—through its incorporation of the Ohio opinion—held that the Kentucky antitrust claims were not within the scope of the arbitration agreements because the elements of those claims did not reference the contracts. See App. 9a (concluding that "[t]he express elements" of the price-fixing claim "do not depend, as a matter of law, on the provider agreements," thus the claims against United were not arbitrable (quoting *Acad. of Med. of Cincinnati*, 800 N.E.2d, at 1187)).

Following the Kentucky decision, the Ohio Supreme Court affirmed the Ohio Court of Appeals's contract-reference arbitrability test as an accurate reflection of federal law, articulating an arbitrability standard for statutory and tort causes of action identical to that of Kentucky. *Acad. of Med. of Cincinnati*, 842 N.E.2d, at 494. Two justices dissented, reasoning that the majority's arbitrability test impermissibly deviated from pro-arbitration federal principles by asking solely whether the plaintiffs' claims referenced the parties' contract, rather than whether, in accordance with *Mitsubishi*, 473 U.S., at 625 n.13, the claims touch matters that fall within the scope of the parties' broad agreement to arbitrate disputes about their business relationship. See *Acad.*

of Med. of Cincinnati, 842 N.E.2d, at 495-496 (Lanzinger, J., dissenting).

Together, the Kentucky and Ohio opinions stake out an approach to arbitrability that, as the dissenting Ohio justices observed, impermissibly deviates from the established "federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement." *Ibid.*

REASONS FOR GRANTING THE WRIT

The Kentucky Court of Appeals's arbitrability standard contravenes the FAA's strong policy favoring arbitration, as reflected in the arbitrability principles articulated by the Court, including the Court's express recognition of the arbitrability of antitrust claims. By insisting that elements of claims reference parties' underlying contracts as a prerequisite to compelling arbitration under the FAA, Kentucky's test renders nonarbitrable nearly all tort and statutory causes of action, which will almost never refer to or directly depend on an underlying contract. Thus, under the standard adopted by Kentucky—and Ohio as well—the antitrust claims in this case, and statutory and tort claims generally, must be litigated in derogation of the parties' contractual bargains to arbitrate—even under the broadest of arbitration clauses. That contract-reference approach eviscerates the protections afforded to arbitration by the FAA. It also creates an untenable circumstance in which arbitrability under the FAA is treated differently in the state courts of Kentucky and Ohio than elsewhere, encouraging litigants to forum shop to escape their arbitration commitments. Because this case presents an important federal question on which the Kentucky and Ohio decisions conflict with relevant decisions of the Court, and of the federal courts of appeals, the Court should grant the petition. SUP. CT. R. 10(b), (c).

I. KENTUCKY'S ARBITRABILITY STANDARD CONFLICTS WITH ESTABLISHED ARBITRABILITY PRINCIPLES ARTICULATED BY THIS COURT AND THE FEDERAL COURTS OF APPEALS.

A. The National Policy Favoring Arbitration Applies Equally to State Courts.

Through the FAA, Congress "reverse[d] the longstanding judicial hostility to arbitration agreements" and "place[d] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S., at 24; see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-13 (1984). Additionally, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S., at 10.

In pursuing its clear objective of ensuring the enforcement of agreements to arbitrate, Congress did not limit the applicability of its mandates to federal courts; rather, it expressly rejected the notion that enforcement of arbitration rights might depend on the forum in which they are asserted. *Id.*, at 15; see also *Mitsubishi*, 473 U.S., at 625-626. Indeed, the two problems against which Congress legislated were endemic to state courts: a common-law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. *Southland*, 465 U.S., at 14. Congress's purpose in enacting the FAA, therefore, "was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." *Id.*, at 13 (internal quotation marks and citation omitted).

B. Kentucky's Arbitrability Standard for Non-Breach-of-Contract Claims Contravenes Fundamental Principles for Analyzing the Scope of FAA-Governed Arbitration Agreements.

The Kentucky test for arbitrability—whether an action can be maintained without reference to the underlying contract—conflicts with the national policy favoring arbitration that is embodied in the FAA and in the arbitration precedent of this Court and the federal courts of appeals. Coupled with Ohio's approval of the identical, impermissibly constrictive arbitrability standard, the Kentucky decision exemplifies a state-court trend of undermining arbitration of statutory and tort claims in a manner that fundamentally guts the arbitral protections Congress enacted in the FAA, warranting the Court's intervention. See also, *e.g.*, *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875-876 (S.C. App. 2005) (noting breadth of arbitration clause covering "all disputes, controversies or claims of any kind and nature" but refusing to compel arbitration of business-tort claims by a borrower against a finance corporation for misuse of personal information, concluding that the claims could be "maintained without reference to the contract" between the borrower and the bank); *Loy* v. *Harter*, 128 S.W.3d 397, 403-405 (Tex. App. 2004) (denying arbitration of business-tort claim for breach of fiduciary duty against a company's director and CFO after concluding that the claim "could be maintained without reference to the contract" governing his employment and was nonarbitrable as unrelated to his employment relationship).

Kentucky's contract-reference arbitrability standard conflicts with the approach of courts that have refused to carve out an exception from established arbitrability principles whenever litigation involves statutory or tort claims. As the Court has made clear, the FAA's "federal policy favoring arbitration . . . is not diminished when a party bound by an

agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S., at 225-226 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). "'[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act 'in controversies based on statutes.'" *Id.*, at 226 (quoting *Mitsubishi*, 473 U.S., at 626-627). Indeed, the Court's longstanding precedent establishes that antitrust claims, and statutory claims generally, are arbitrable. See, *e.g.*, *PacifiCare*, 538 U.S., at 405-406 (RICO claims); *Gilmer*, 500 U.S., at 26 (ADEA claims); *McMahon*, 482 U.S., at 230-233 (RICO and Securities Exchange Act claims); *Mitsubishi*, 473 U.S., at 627, 632-637 (international antitrust claims).

The Kentucky court, however, displayed a judicial hostility to arbitration by establishing a distinct test for arbitrability of statutory and tort causes of action that distorts the federal arbitrability standard in a manner that critically deviates from the FAA's mandates and settled federal arbitration precedent. Indeed, its decision begins with the erroneous observation that "[t]here has been . . . reluctance by the federal and state courts to compel arbitration of antitrust claims," relying on the long-dead *American Safety* doctrine, under which courts once viewed antitrust claims as inherently unsuitable for arbitration. See App. 7a-8a & n.7; see also *Am. Safety Equip. Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 826-829 (CA2 1968). The Court repudiated that belief over twenty years ago. See *Mitsubishi*, 473 U.S., at 627, 632-637; see also, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *DaimlerChrysler Motors Corp.*, 271 F.3d 6, 11 (CA1 2001); *Kotam Elecs., Inc.* v. *JBL Consumer Prods., Inc.*, 93 F.3d 724, 727 (CA11 1996) (en banc) (explaining that *Mitsubishi* "dismantl[ed] all of the *American Safety* policy considerations"); *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441, 1442 (CA9 1994) (explaining that *Mitsubishi* involved "the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine"). Far

from displaying reluctance, federal district courts and state courts have routinely compelled arbitration of antitrust claims. See, *e.g.*, *N.Y. Cross Harbor R.R. Terminal Corp.* v. *Consol. Rail Corp.*, 72 F.Supp.2d 70 (EDNY 1998); *Hunt* v. *Up N. Plastics, Inc.*, 980 F.Supp. 1046 (Minn. 1997); *Crown Homes, Inc.* v. *Landes*, 27 Cal.Rptr.2d 827, 834 (Cal. App. 1994).

In *Mitsubishi*, the Court not only rejected a distrust of arbitration for antitrust and other statutory claims, but also required arbitration when a dispute's allegations "touch matters" covered by the parties' arbitration agreement. *Mitsubishi*, 473 U.S., at 625 n.13. Federal courts of appeals, in conflict with the Kentucky and Ohio courts, have adhered to *Mitsubishi*'s touch-matters test for tort and statutory claims, requiring a "focus on the factual allegations in the complaint rather than the legal causes of action asserted . . . whatever the legal labels attached." *Genesco, Inc.* v. *T. Kalcuchi & Co., Ltd.*, 815 F.2d 840, 846 (CA2 1987) (holding that torts can be covered by arbitration clauses "if the allegations underlying the claims 'touch matters' covered by the [agreement]"). State courts, too, have recognized the propriety of applying the touch-matters test to claims other than breach of contract. See, *e.g.*, *MS Credit Ctr., Inc.* v. *Horton*, — So.2d —, No. 2004-CA-01699-SCT, 2006 WL 408415, at *6 (Miss. Feb. 23, 2006) (analyzing arbitrability of business-tort claims under the touch-matters test).

Consistent with the touch-matters test, courts of appeals have rejected attempts to evade arbitration by artfully pleading, as torts, claims relating to the parties' contractual or business relationships. See, *e.g.*, *Fazio* v. *Lehman Bros.*, 340 F.3d 386, 395 (CA6 2003) ("Even real torts can be covered by arbitration clauses if the allegations underlying the claims touch matters covered by the agreement.") (original brackets, citation, and quotation marks omitted); *Fyrnetics, (H.K.) Ltd.* v. *Quantum Group, Inc.*, 293 F.3d 1023, 1030 (CA7 2002)

(rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation); *Pennzoil Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (CA5 1998) (holding that a broad arbitration agreement "embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute"); *Gregory* v. *Electro-Mech. Corp.*, 83 F.3d 382, 384 (CA11 1996) ("Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted.").[4] The Kentucky opinion, however, will encourage artful pleading by hinging arbitrability on whether the complaint references the contract containing the arbitration clause, effectively limiting arbitration to breach-of-contract claims.

C. The Kentucky Standard Conflicts with the Second Circuit's Use of the Touch-Matters Test for Price-Fixing Conspiracy Claims.

The Kentucky opinion conflicts not only generally with the touch-matters test from *Mitsubishi* and its progeny, but also specifically with the Second Circuit's decision in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004), which used the touch-matters standard to determine the arbitrability of price-fixing conspiracy claims against ocean carriers whom the plaintiffs alleged exploited their market power to fix worldwide shipping rates. *Id.*, at 167-168, 172-173. Analyzing precisely the type of dispute that this case presents, the Second Circuit reversed the trial court's

---

[4] Moreover, when, as in this case, the arbitration agreement is broad, courts have declined to carve out categories of claims from the expansive scope of the parties' arbitration agreement. See *Brown* v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (CA11 2000) (explaining that use of the phrase "any dispute" in an arbitration agreement means that the "parties agreed to arbitrate any and all claims against each other, with no exceptions"); see also, *e.g.*, *Genesco*, 815 F.2d, at 846.

ruling that the claims were nonarbitrable because they could be proven without reliance on the parties' contracts. *Id.*, at 168.

The Second Circuit acknowledged that the price-fixing conspiracy allegations "rest[ed] on factual allegations which concern matters beyond the making of a particular contract between the parties and the performance of its terms" and therefore "will not focus exclusively 'upon the parties' conduct under the terms of the charter.'" *Id.*, at 175. Nonetheless, the court reasoned that the plaintiffs could not have suffered the damages from the alleged price fixing had they not entered into the contracts, "each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.'" *Ibid.* Accordingly, the price-fixing claims, though purportedly extra-contractual, arose out of the contracts and fell within the parties' broad arbitration agreements. *Id.*, at 176 (holding that antitrust disputes "unquestionably involve a core issue of the contracts between the parties—allegations that the price terms set forth in those contracts have been artificially inflated as a result of the price-fixing conspiracy").[5]

Under *JLM*'s reasoning, the price-fixing allegations in this case would plainly fall within the scope of the parties' broad arbitration agreement, which the Kentucky court's contrary decision eviscerates based on the statutory nature of the claims. By adopting a narrow test for statutory causes of

---

[5] A district court within the Second Circuit similarly applied the touch-matters standard in determining the arbitrability of claims alleging that banks engaged in price fixing regarding currency conversion fees when cardholders conducted foreign currency transactions with their credit cards and the fixed prices appeared on the credit card accounts. *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 406, 410 (SDNY 2003). The court held that the claims were arbitrable because the terms of plaintiffs' use of the credit-card accounts were governed by the cardholder agreements containing the arbitration clause. *Ibid.*

action that, as a practical matter, will render them non-arbitrable in virtually every case, the Kentucky and Ohio courts conflict with this Court's and lower federal and state courts' accepted recognition that statutory claims are arbitrable under the same conditions as other claims: when they touch matters within the scope of the parties' arbitration agreement.

D. The Kentucky Decision Contravenes the Court's Directive to Construe Arbitration Agreements in Favor of Arbitration.

The Kentucky court not only instituted an impermissibly restrictive arbitrability standard for statutory claims, but also violated fundamental arbitrability principles by disregarding the requirement that courts construe arbitration agreements in favor of arbitration. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625; *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985). Under the FAA, any doubts about arbitrability must be resolved in favor of coverage, and arbitration must be compelled unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co* , 363 U.S. 574, 589 (1960); see also *Moses H. Cone*, 460 U.S., at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Despite its duty to construe the United arbitration agreements broadly under the Court's precedent, the Kentucky court's impermissibly constrictive scope analysis defeated the parties' agreement to arbitrate "any disputes about their business relationship." Under a proper analysis, as the Ohio Supreme Court dissent recognized regarding antitrust claims in the parallel Ohio litigation, respondents' price-fixing conspiracy allegations plainly touch matters concerning the parties' business relationship because the contracts "allegedly contain the evidence of anticompetitive conduct and financial

harm" and "the reimbursement rates allegedly implicating unlawful restraint." *Acad. of Med. of Cincinnati*, 842 N.E.2d, at 496 (Lanzinger, J., dissenting). Accordingly, as the Ohio dissent concluded, "[t]he antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship' between the physicians and United Healthcare." *Ibid.*

Because the price-fixing conspiracy allegations necessarily center on the parties' business relationship, the Kentucky court's refusal to compel arbitration and its creation of a distinct, narrow arbitrability standard for statutory and tort claims reflect a revived judicial hostility to arbitration that is compounded by Ohio's implementation of an identical and equally restrictive standard. In light of this state-court trend—which includes similar holdings from Texas and South Carolina[6]—the Court should grant the petition to clarify whether, as *Mitsubishi* and *McMahon* indicated, 482 U.S., at 225-226, 473 U.S., at 626-627, the FAA, the national policy favoring arbitration, and this Court's admonition to faithfully enforce the negotiated terms of parties' arbitration agreements apply equally to motions to compel arbitration of statutory claims or whether, as Kentucky and Ohio concluded, courts should enforce arbitration rights only when the elements of such claims expressly reference the contract in question.

II. KENTUCKY'S HOSTILITY TO ARBITRATION INVITES GAMESMANSHIP AND FORUM SHOPPING.

By focusing on the formal elements of claims to the exclusion of textual analysis of parties' arbitration agreements, the Kentucky court's restrictive standard improperly encourages gamesmanship by tying the scope-of-arbitrability determination to the formalities of a plaintiff's pleadings,

---

[6] See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

which can be creatively drafted to avoid reference to the relevant contract and thus permit plaintiffs to evade arbitration. Rather than ensuring the enforcement of valid arbitration agreements, as Congress mandated in the FAA, the Kentucky standard creates a safe harbor for parties who wish to breach their obligation to arbitrate, authorizing plaintiffs to do precisely what other courts have forbidden: escape arbitration commitments by recasting a dispute in tort or as a statutory violation. See, *e.g.*, *Fazio*, 340 F.3d, at 395 (holding that a party cannot avoid arbitration simply by framing its action in tort); *Fyrnetics*, 293 F.3d, at 1030 (rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation). In other words, the decision effectively creates a zone of nonarbitrability for plaintiffs sufficiently sophisticated to plead their claims as statutory or tort claims, rather than directly as contractual violations.

This dangerous erosion of arbitration rights, exacerbated by the implementation of the same standard in Ohio, will encourage forum shopping and generate jurisdictional disputes when parties seeking to escape arbitration obligations target Kentucky and Ohio state courts, while those wishing to enforce arbitration agreements attempt to be heard in federal court or other state courts.[7] The Court should grant the petition to reaffirm that arbitrability depends on the language of parties' agreements, not the forum chosen.

Additionally, by departing from traditional scope analysis in favor of a new contract-reference test, the Kentucky and Ohio decisions will create confusion and uncertainty over the availability of arbitration for statutory and tort claims. For

---

[7] South Carolina and Texas courts' implementation of the same arbitrability test makes additional inroads on arbitration rights and further demonstrates the need for review of the arbitrability standard for non-contractual claims. See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

countless contracts containing broad arbitration clauses like respondents' agreements with United, the Kentucky and Ohio decisions will upset parties' settled, and reasonable, expectations that courts will honor their carefully negotiated agreements. By effectively excluding statutory and tort claims from arbitration regardless of the language parties include in their arbitration agreements, the Kentucky and Ohio opinions also introduce unavoidable unpredictability for parties negotiating contracts that reflect broad agreements to arbitrate but rely on Ohio or Kentucky law. Indeed, these decisions may deter parties seeking broad arbitration agreements from entering into contracts governed by Kentucky or Ohio law.

Unless addressed by the Court, the Kentucky and Ohio opinions stand as an open invitation to other courts that have never fully embraced arbitration and now have ammunition to disparately treat motions to compel arbitration of claims other than breaches of contract. This trend dangerously threatens the FAA's arbitral protections and the strong national policy favoring arbitration in two significant respects. First, it will undermine Congress's primary goal of permitting parties to avoid litigation by honoring their agreements not to litigate certain—or all—disputes between them. See, *e.g.*, *Southland*, 465 U.S., at 7 (noting that one party's avoidance of arbitration may lead to protracted litigation, "one of the very risks the parties, by contracting for arbitration, sought to eliminate"). Second, these opinions, if unreviewed, will signal that no consequences lie for a court that egregiously deviates from Congress's clearly expressed will in enacting the FAA. See *supra* Part I.A.

Because the Kentucky and Ohio courts' arbitrability standard undermines the national policy favoring arbitration, dramatically departs from established federal precedent, and eviscerates parties' contractual rights while also establishing an incentive for litigants to use the Kentucky and Ohio courts

in a manner inconsistent with the FAA, the Court should grant the petition and determine whether statutory claims must be arbitrated only when they reference the underlying contract or whether, consistent with arbitrability principles governing all other categories of claims, courts must compel arbitration when allegations touch matters within the scope of the parties' arbitration agreement.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

STEPHEN J. BUTLER
THOMPSON HINE
312 Walnut Street
14th Floor
Cincinnati, Ohio 45202
(513) 352-6700

DEBRA J. PEARLSTEIN
ELIZABETH M. AVERY
WEIL, GOTSHAL &
MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GREGORY S. COLEMAN
Counsel of Record
LISA R. ESKOW
MELANIE P. SARWAL
WEIL, GOTSHAL &
MANGES LLP
8911 Capital of Texas Hwy.
Suite 1350
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioner

May 16, 2006